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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 1 73 584

ALAN DAVID SIANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

ALAN DAVID SIANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Petitioner, Alan David Sians, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review its final order and judgment of July 5, 1973, which affirmed the judgment of conviction of the United States District Court for the Northern District of Illinois, W. D. (Julius J. Hoffman, J.). Under that judgment of conviction petitioner was sentenced to five years in jail and fined $5,000 on a one-count indictment charging violation of 18 USC 1462 (Obscenity).

Opinions Below.

Trial was had in the United States District Court, Northern District of Illinois, W. D. (Hon. Julius J. Hoffman), and was by jury. There was no opinion of the district court. On December 14, 1972, the Seventh Circuit entered a memorandum order directing that its de-

cision on appeal await the outcome of *United States v. Orito,* U. S. , 37 L. Ed. 2d 513 (1973). On July 5, 1973, the Seventh Circuit entered a one-paragraph memorandum order affirming the judgment of conviction. The memorandum orders of December 14, 1972, and July 5, 1973, are not reported; copies are annexed hereto as Appendix A and B.

Jurisdiction.

The memorandum order of the Seventh Circuit affirming the judgment of conviction was entered July 5, 1973. A timely petition for rehearing was filed. On August 2, 1973, the Seventh Circuit granted leave to file an amendment to the petition for rehearing (Appendix C). The petition for rehearing was denied on August 8, 1973 (Appendix D). On August 20, 1973, Mr. Justice Rehnquist signed an order extending the time for filing this petition for writ of certiorari to and including October 7, 1973. This court's jurisdiction is invoked under 28 USC 1254(1).

Questions Presented for Review.

1. On July 5, 1973, the Seventh Circuit summarily affirmed by a one-paragraph memorandum order a judgment of conviction for violation of 18 USC 1462. Should that judgment be vacated and remanded under the First Amendment and Due Process Clause where the Seventh Circuit by its December 14, 1972 order held its decision to await this court's decision in *United States v. Orito,* U. S. , 37 L. Ed. 2d 513, but where the Seventh Circuit memorandum order of July 5, 1973, did not consider any of the multiple questions posed by *Miller v. California,* U. S. , 37 L. Ed. 2d 419, *et al.,* and is in direct conflict with the June 21 and June 25, 1973, dispositions of this court?

2. Under the First Amendment and Due Process Clause can the indictment and conviction under 18 USC 1462 for an act committed before June 21, 1973, in a case pending on June 21, 1973:

A. Be sustained where there was and is no decision in the Seventh Circuit and none under Illinois state law which has authoritatively construed 18 USC 1462 to define patently offensive depictions of hard-core sexual conduct in accord with the definitions in *Miller v. California, et al.*?

B. Can it be sustained under the old utterly without redeeming social value test or new serious literary, artistic, political or scientific value test?

3. A. Was it a violation of the First Amendment and Due Process Clause to deprive defendant of the right to introduce any evidence of community standards?

B. Must the conviction be reversed where it is not clear whether the trial court applied a national standard, a state standard or a local standard?

4. *Miller, supra,* held in state prosecutions that the First Amendment does not require uniform national standards for two substantive elements of the crime, patent offensiveness and prurient interest, that national standards are not ascertainable and states must make their own choices.

A. If national standards are unascertainable, and state law choices must control, then is 18 USC 1462 unconstitutional as furnishing no ascertainable standard of guilt? Has this court made substantive elements of a federal penal statute turn on state law?

B. Under the United States Constitution, Article I, Section 1, and Section 8, Clause 18, and due process, may this court make state law control? If so, is 18 USC 1462 vague and overbroad as to prosecutions pending on June 21, 1973?

5. Under the United States Constitution, Article I, Section 1, and Section 8, Clause 18, and due process, does this court have the power in the first instance to select which of the categories of patently offensive depictions of sexual conduct should be banned?

Constitutional Provisions and Statutes Involved.

Involved herein are the First Amendment and Due Process Clause of the Fifth Amendment to the United States Constitution, Article I, Section 1, and Article I, Section 8, Clause 18, of the United States Constitution; Title 18 of the United States Code, Section 1462 (Appendix E).

Statement of the Case.

A. Preliminary statement.

Before proceeding we emphasize preliminarily the first reason why the petition should be granted. The July 5, 1973, four-sentence memorandum order of the Seventh Circuit is in direct conflict with the disposition in approximately 59 cases decided by this court on June 21 and June 25, 1973, when every state and every federal obscenity conviction was vacated and remanded for reconsideration in the light of *Miller, et al.* The Seventh Circuit memorandum order of July 5, 1973, which affirmed the judgment of conviction, does not remotely purport to contain a reconsideration in the light of *Miller, supra, et al.*

B. The trial.

In August, 1970, petitioner (hereafter defendant) was indicted for knowingly causing, in December, 1968, a common carrier to be used for an interstate shipment of 50 magazines and 80 decks of cards in violation of 18 USC §1462.

The trial commenced April 6, 1971. Defendant's counsel issued subpoenas *duces tecum*, to certain newspapers and their reporters, including the "Daily News," the "Chicago Tribune" (Tr. 7) and "Chicago Today." The testimony and material was sought for purposes of demonstrating community standards concerning the types of sex-oriented material openly sold (Tr. 13), and the cross-sections and different types of persons in the community openly purchasing such material "as very revelant to this lawsuit to determine whether or not our standards are such that the material should not be considered obscene" (Tr. 13); the testimony "will be relevant in aiding this court in determining what the standards of this community are in this community" (Tr. 27).

On April 6, 1971, the court quashed the subpoena on the "Daily News" (James Kloss) on the ground that "there is nothing in the subpoena that indicates that there is anything germane to the issues" and that it is "an absurdity" (Tr. 15). On April 7, 1971, the court quashed the other subpoenas stating *inter alia* (Tr. 30) that "these cases are not • • • decided based on standards of a community."

The trial court in over 30 pages of argument (Tr. 7-38) made it very plain that evidence of what was being openly sold and purchased was not going to be admitted for defendant on the issue of community standards. The testimony would have shown that what the Seventh

Circuit calls "shockingly obscene" was being openly sold and purchased by respectable elements of the community. Subsequently, the trial court (Tr. 484-490) refused to permit the defendant to testify as to what he had purchased in book stores in Chicago to "show the standards of the community," and on this issue made a comment in the presence of the jury (Tr. 486) which was tantamount to a directed verdict for the government.

James Harris, the first government witness testified that in November, 1968, he arranged to purchase magazines and playing cards from defendant (Tr. 124-125), and in early December, 1968, received the material at the Greyhound Bus Depot.

Thereafter the trial court permitted the government to elicit testimony (previously excluded) concerning preindictment transactions in September, 1968, and in October, 1968, and post-indictment transactions between Harris and defendant. Over repeated objections, the government's case was replete with testimony by Harris and others about defendant's general business in "pornography" (Tr. 269-270), "good movies" (Tr. 276) and dealings in "similar" types of materials, all involving acts completely unrelated to the indictment. We will assume, *arguendo* only, that the government's position is correct that evidence of other dealings in alleged "pornography" was admissible to show intent or common scheme, and certiorari is not sought merely to review this point.

However, if the government, in an obscenity prosecution, is to be permitted to show acts of a defendant unrelated to the indictment in dealing with sex-oriented and alleged pornographic material, casting it all in the light of supposed illegality, then it is even more important that a defendant be permitted to show what material others are openly selling on the community standards issue.

Otherwise, the case boils down to a directed verdict for the government, which is essentially what happened.

The trial court also excluded all evidence offered by defendant on community standards, including publications with pictures of sexual intercourse, etc., openly sold in the Chicago area and purchased by defendant. The error was compounded by the following. The court, in the presence of the jury, looked at one of the exhibits for purposes of determining admissibility, and stated (Tr. 487):

> "I think that if this demonstrates the standards of the community, maybe it is well that this cause proceed to try to change the standards, Mr. Rotenberg."

The trial court charged the jury as follows (Tr. 637):

> "• • • The material must be judged by the standards of the community as a whole. In determining contemporary community standards, you may consider what, as shown by the evidence admitted during the trial, appears in contemporary magazines, books, newspapers, television programs, motion pictures and other media of communication which are freely available in the community as a whole."

Thus the trial court stated that the jury should consider what was "freely available in the community as a whole," but refused to let the defendant show what was "freely available." Aside from due process error, the questions presented as to how and when a defendant can introduce community standards evidence involves a constantly recurring problem (Pt. III-A, *infra*) with little guidance from this court.

C. The memorandum orders of the Seventh Circuit.

On December 14, 1972, the Seventh Circuit Court of Appeals entered a memorandum order directing that the decision "of this appeal be held in abeyance until the Supreme Court decided the case entitled *United States v. Orito*" (App. A). On July 5, 1973, the Seventh Circuit entered a memorandum order of four sentences stating that *United States v. Orito* answered appellant's challenge to the constitutionality of the statute, and that "the material, by any standard, is shockingly obscene" (App. B).

The unconstitutionality of 18 USC 1462 on *Stanley v. Georgia*, 394 U. S. 557 (1969), grounds was first raised on pretrial motion (denied) and on appeal. The exclusion of proof of community standards (Pt. III-A, *infra*) was raised at the trial, appeal and in the rehearing petition. The remaining issues posed in this petition involving *Miller, supra, et al.*, grounds were raised by the petition for rehearing and amendment to the petition for rehearing.

REASONS FOR GRANTING THE WRIT.

I.

The July 5, 1973 memorandum order is in direct conflict with *Miller v. California, et al.*, and the approximately 59 dispositions of June 21 and June 25, 1973; and does not carry out one of the main objectives of *Miller, supra;* the matter is of nationwide importance. At a minimum the judgment should be vacated and remanded.

The July 5, 1973, memorandum order of the Seventh Circuit affirming defendant's judgment of conviction (and five-year jail sentence) is in direct conflict with the dispositions in the approximately 59 obscenity cases of June 21 and 25, 1973, in conflict with *Orito, supra,* and, more important, with one of the main principal objective of *Miller, supra, et al.*

In every state and federal case involving an obscenity statute the criminal judgment of conviction was vacated and remanded. However, the Seventh Circuit's memorandum order summarily affirmed with no reconsideration.

The Seventh Circuit by its December 14, 1972, memorandum order stated it was holding its "decision of this appeal * * * in abeyance until the Supreme Court decided the case entitled *United States v. Orito* * * *." But in *Orito, supra,* 37 L. Ed. 2d at 519, this court vacated and remanded "for reconsideration of the sufficiency of the indictment in the light of *Miller v. California, supra; United States v. 12 200-Ft. Reels, supra,* and this opinion." The Seventh Circuit's July 5, 1973, memorandum order did not reconsider the indictment sufficiency or conviction in the light of any of the issues.

One of the clear main objectives of *Miller, et al.*, in formulating the new second prong (part b) of the new tripartite test was to give the states and federal government opportunity to specifically define patently offensive depictions of sexual hard-core conduct so as to give fair notice and fair warning. *Miller* certainly made it plain that it was only "today [i. e., June 21, 1973], for the first time since *Roth* • • • a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography" so that the court can now give "positive guidance," 37 L. Ed. 2d at 434, and, 37 L. Ed. 2d at 432, "no one will be subject to prosecution • • • unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."

The stated objective of this court in requiring that patently offensive depictions of sexual hard-core conduct be specifically defined to give fair notice and positive guidance is certainly not being furthered by the Seventh Circuit's affirmance which merely says "the material, by any standard, is shockingly obscene." Intending no disrespect to the Seventh Circuit, this is not an authoritative construction and is not a definition under *United States v. 12 200-Ft. Reels,* U. S. , *supra,* 37 L. Ed. 2d at 507, n. 7; it is as meaningless as the widely divergent pre-*Miller* non-definitions of hard-core pornography.

We are not suggesting that the old, discarded, ambiguous, nonascertainable standards of guilt or that part (b) of the new test with standards are yet to be specifically defined can be applied to this case to send a man to jail for five years on a one-count indictment. We submit they can't be (see Point II *et seq.*). However, the Seventh Circuit memorandum order has made no attempt to define

the terms under part (b) of the test for future guidance, or to consider any of the other issues of *Miller, et al., supra.* On a matter as important as this affecting entire industries and hundreds of cases, this court and all concerned are entitled to a reasoned and considered analysis of the views of the lower court. On this basis alone the judgment should be vacated and remanded.

We note that as of the date of writing this petition state and federal courts have, on reconsideration under *Miller,* set aside indictments and obscenity convictions or invalidated obscenity statutes on various of the grounds here urged under Point II, *infra.* Indiana—*Stroud v. Indiana,* 273 N. E. 2d 842 (Ind. Sup. Ct. 1971), vacated and remanded U. S. , 37 L. Ed. 2d 1025 (June 25, 1973), on remand *Stroud v. Indiana,* No. 570 S. 107, Ind. Sup. Ct., Aug. 21, 1973, and *Mohney v. Indiana,* 276 N. E. 2d 517 (Ind. Sup. Ct. 1971), vacated and remanded U. S. , 37 L. Ed. 2d 1026 (June 25, 1973), on remand *Mohney v. Indiana,* No. 471 S. 94, Ind. Sup. Ct., Aug. 21, 1973 (in *Stroud* and *Mohney, supra,* Indiana obscenity statute held unconstitutional; judgments of conviction reversed). California—*United States v. Lang,* No. 10712-HP-CD, C. D. Cal., July 18, 1973 (indictment dismissed). Florida—*Papp v. Florida,* Nos. 70-1077, 71-917, Fla. Dist. Ct. App., 4th Dist., July Tm, 1973 (conviction reversed and indictment dismissed; *Miller* held to apply prospectively only). Iowa—*Iowa v. Lavin,* Nos, IM1-242, 319, 396, 397, IM2-230, 231, 261, Iowa Dist. Ct., Linn Co., August 13, 1973 (obscenity informations dismissed and statute held unconstitutional). New York—*Redlich v. Capri Cinema,* No. 41543/1973, N. Y. Sup. Ct., N. Y. Co., N.Y.L.J., Aug. 15, 1973, page 2, column 3 (CPLR §6330 incorporating by reference Penal Obscenity Law §235.00 held unconstitutional). New Jersey—*Hamar Theatres, Inc., v. Cryan,* D. N. J. (3-judge ct.), civil action no. 472-73,

July 26, 1973 (New Jersey obscenity statute held unconstitutional). There are concededly several cases to the contrary. Undoubtedly many of the cited cases, those *contra,* and others we are not aware of, will be presented to this court for review. If the court does not vacate, it is suggested alternatively that this court may wish to hold this petition pending consideration of other cases presenting similar issues.

II.

There is no decision in the Seventh Circuit construing 18 USC 1462 in accord with the second prong of the *Miller v. California* tripartite test, and hence the conviction should be reversed; even if the Seventh Circuit had construed 18 USC 1462, it could not be applied retroactively; additionally, there can be no conviction under the old social value test or new serious value test.

A. 18 USC 1462 does not and no Seventh Circuit or Illinois State decision to our knowledge specifically defined on June 21, 1973, patently offensive depictions of sexual conduct; the indictment should be dismissed.

Miller held, 37 L. Ed. 2d at 432, that "under the holdings announced today, no one will be subject to prosecution * * * unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by regulating state law, as written or construed."

Our research has uncovered no decision of the federal courts in the Seventh Circuit which has construed 18 U. S. C. 1462 or any federal obscenity statute so as to define patently offensive depictions of sexual conduct in accord with the guidelines, definitions or examples of *Miller, supra,* 37 L. Ed. 2d at 431, under part (b) of the new tripartite test. We submit there is no such case.

Assuming for the moment that federal definitions under part (b) of the new test must turn on state law, there is no authoritative definition in Illinois.

People v. Ridens, 51 Ill. 2d 410, 282 N. E. 2d 691 (1972), vacated and remanded *sub. nom. Ridens v. Illinois*, U. S. , 37 L. Ed. 2d 1030, involved the Illinois obscenity statute. One part of that statute recites almost verbatim the second part of the Roth-Memoirs "substantially beyond customary limits of candor in descriptions or representations" of nudity, sex or excretion test. *Ridens, supra*, and to our knowledge no other Illinois case, has construed the Illinois statute to define the term patently offensive depictions of sexual hard-core conduct.

Since on June 21, 1973, there was no Seventh Circuit or Illinois state decision which authoritatively construed the statute to define patently offensive depictions of sexual conduct, and the statute obviously does not define the term, the conviction should be reversed.

In *Stroud v. Indiana, supra*, the Indiana Supreme Court after remand from this court held the Indiana statute unconstitutional and reversed the judgment of conviction. The Indiana statute, as far as the definition of obscenity, follows the federal statute using the words "obscene, lewd, indecent," etc. However, the Indiana statute had also been construed to incorporate the Roth-Memoirs test verbatim, just as 18 U. S. C. 1462 had been so construed. *Stroud* held under *Miller, supra*, that the Indiana statute was "too general in nature and does not set out specifically the sexual or obscene acts," and reversed the conviction.

Redlich, supra, held the term customary limits of candor in describing nudity or sex set forth in the New York Penal Obscenity statute, Penal Law §235.00, is not the

equivalent of and is different from patent offensive representations of ultimate sex acts and is not a definition of patently offensive sexual conduct. The court held unconstitutional CPLR §6330 (Civil Injunction Statute) and therewith Penal Obscenity Statute §235.00 incorporated by reference.

It is not surprising that there is no case in the Seventh Circuit which has authoritatively construed 18 U. S. C. 1462 to define patently offensive depictions of sexual hardcore conduct. For if we read the majority opinion of *Miller* correctly, part (b) of the new test is an altered but purposefully new definition in order, *inter alia*, to furnish for future conduct concrete guidelines which had not been furnished before. This is a fair use of prospective law making.

Assuming for the moment that the Seventh Circuit had undertaken to construe 18 U. S. C. 1462 in accord with note 7, *United States v. 12 200-Ft. Reels, supra*, 37 L. Ed. 2d at 507 n. 7 (which the Seventh Circuit did not remotely undertake to do), the new definitions could not be applied retroactively to this case. *Bouie v. City of Columbia*, 378 U. S. 347 (1964); *Shuttlesworth v. Birmingham*, 394 U. S. 147, 156 (1969); *Ashton v. Kentucky*, 384 U. S. 195, 198 (1966); *Pierce v. United States*, 314 U. S. 306, 311 (1941); see, also, 20 Am. Jur. 2d *Courts* §236; 51 Virginia Law Review 201, 254.

B. There can be no conviction under the old social value or new serious value tests.

Subject material was not utterly without redeeming social value in accord with the rhetorical statement posed in the dissent of Mr. Justice White in *Memoirs v. Massachusetts*, 383 U. S. 413, 461, and in accord with the

Memoirs, supra, test carried to its logical conclusion. "Fanny Hill," we note, is the archtype of pornography devoted to little except minute and vivid depictions of sexual acts (383 U. S. at 446-447, Clark, J., dissenting). "Fanny Hill" has social value, and there is no difference between the pictures and the printed word. *Kaplan v. California,* U. S. , 37 L. Ed. 2d 492, 496, 497.

In *Miller* this court cast it in different terms, namely, that the social value test of *Memoirs, supra,* essentially had no meaning at all. That is not an ascertainable standard of guilt, a conclusion emphasized by *Redrup v. New York,* 386 U. S. 767 (1967), practices, *Stanley v. Georgia,* 394 U. S. 557 (1969), and the questions posed in *Alexander v. Virginia,* 408 U. S. 921, and in *Paris Adult Theatre v. Slaton,* 408 U. S. 921 (June 26, 1972).

The new serious value test may not be applied retroactively.

The petition should be granted and the conviction reversed.

III.

The exclusion of all evidence for defendant on the community standards issue was a violation of due process; this is a critical issue where this court has given little guidance, and especially important in view of *Miller*, *supra*. Additionally, the failure to charge whether the standard was national, state or local is a due process violation.

A. The exclusion of Community standards evidence for defendant.

The trial court excluded all evidence for defendant which would show what material was being openly sold and purchased as proof of the community standards, and that what defendant sold did not exceed it. That evidence, particularly that of newspaper reporters who were investigating and writing about the matter, would have demonstrated that what defendant sold was freely available and openly sold and was within the scope of the community standards. The denial of this right is a violation of due process. *Smith v. California*, 361 U. S. 147, 171-172 (Harlan, J., concurring and dissenting).

Concededly the community standards testimony was not offered by way of an expert. But the trial record is very plain that the trial judge was *not* going to permit community standards testimony in any form. The trial court at one point suggested it might consider an expert (Tr. 34), and then in the next breath said twice "I have never heard of an expert in pornography" (Tr. 34); the reporter would have to be an "expert in crime • • • you have got a tough job ahead of you" (Tr. 36). The repeated exclusion of any community standards testimony for defendant must be placed against the court's state-

ment that "these cases are not * * * decided based on standards of a community" (Tr. 30). In any event, as Mr. Justice Harlan pointed out in *Smith v. California, supra,* 361 U. S. at 172, the community standards proof need not be made by an expert, and it is a due process violation to exclude all such evidence. This error was compounded by the judge's comment (Tr. 487) in the jury's presence, which was tantamount to a directed verdict.

The question of the admissibility for defendant on the community standards issue of other essentially similar material is a constantly recurring one, with little guidance from this court, and particularly important in view of Part III of *Miller v. California, supra.* Some courts permit juries to see evidence of what is bought, sold or distributed.[1] *Womack v. United States,* 294 F. 2d 204, 206 (D. C. Cir. 1961), is a lead case contra.

In *Womack, supra,* one basis for exclusion was that there was no foundation to show "a reasonable degree of community acceptance of works like his own." Space does not permit, so we can only say, in conclusory form, that this begs the question and negates the entire concept of a community standard, leaves a jury in the dark, leaves no breathing space, and takes the issue out of the hands of the jury. The fact triers are entitled to know as an essential element for their determination what is being sold and what is available; facts which are not that well known. The *Womack* rule takes the issue away from the jury.

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[1] *United States v. Motion Picture Entitled "Pattern of Evil"* (S.D.N.Y., Civil No. 69-2157, Feb. 1970, Cannella, J.) (other films displayed to jury: "I Am Curious-Yellow" and "Without A Stitch"; picture held not obscene); *People v. Buckley,* 65 Misc. 2d 917, 320 N. Y. S. 2d 91 (Crim. Ct. N. Y. Co. 1971) (trial court permitted evidence of what was being sold, quite aside from expert testimony).

In any event, except for the opinion of Mr. Justice Harlan in *Smith, supra,* there is no guidance from this court, and for this reason alone the petition should be granted.

B. The jury was not advised what standard it should apply, national, state or local.

We submit it impossible to tell from the court's charge whether the standards were national, Illinois state or local Chicago. This is a charge with no standard. On this additional basis the judgment should be vacated, and, under Point IV, *infra,* reversed.

IV.

***Miller* held in state prosecutions the First Amendment does not require national standards, national standards are unascertainable, and states must make their own election both as to prurient interest and patent offensiveness by local (state) standards. The federal statutory law therefore turns on state law. Since national standards are not ascertainable, 18 USC 1462 is unconstitutional. Further, it is up to Congress to make the federal statute turn on state law, and in any event 18 USC 1462 is both vague and overbroad.**

A. This court has made patent offensiveness and prurient interest in federal prosecutions turn on state law, and correctly so under *Miller*. In addition, since national standards are unascertainable, there is no ascertainable standard of guilt and 18 USC 1462 is unconstitutional.

Patent offensiveness and prurient interest are substantive elements of the federal crime. We submit that the holding rationale and premises of Part III of *Miller, supra,* have made prosecutions under 18 USC 1462 turn on state choices and definitions of what patently offen-

sive depictions of sexual conduct shall be banned and regulated and has made state law applicable to the prurient interest test. The holding rationale and premises of Part III of *Miller, supra,* also render 18 USC 1462 unconstitutional for cases pending on June 21, 1973.

In *12 200-Ft. Reels, supra,* 37 L. Ed. 2d at 507, the court said that the *Miller* "standards are applicable to federal legislation," and in note 7 that if serious vagueness doubts are raised, that the court is prepared to construe the terms of the federal statutes as limiting regulated material to patently offensive descriptons, etc., given as examples in *Miller.*

Firstly, *Miller, supra,* 37 L. Ed. 2d at 434, held that the First Amendment "does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive' * * * [and] to require a state to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility." *If in a state prosecution it is, as this court held, an exercise in futility to structure the evidence around a national standard, and national standards are unascertainable, it is equally an exercise in futility to try to divine unascertainable national standards in a federal prosecution.*

Secondly, a second stated premise of *Miller* was that local communiites (which we assume for the moment to be statewide) should make the choices concerning both the prurient interest and patent offensiveness test and should not be, as *Miller* held, "strangled by the absolutism of imposed uniformity." That cannot be accomplished if in a federal prosecution there is to be a national standard. Hypothetically let us assume Pennsylvania and New York choose to drop all controls on the printed word (books) representations of sexual conduct because today they are not patently offensive, or for whatever

reasons. The legislative bodies of those states have made a choice that books are not patently offensive to those communities. The fact question about the patent offensiveness of a book cannot reach the jury. If there is a national standard which permits the federal government to prosecute for a sale, etc. of the very material which local communities have elected *not* to ban, then obviously the local communities are not making the very choices on two substantive elements of the crime which *Miller, supra,* held the local communities must make. In our hypothetical example there could be, we submit, no federal prosecution for interstate shipment on either end, Pennsylvania or New York.

In addition, the *Miller* objectives of fair notice, etc. will not be served if there is a federal penal statutory common law with some unascertainable and hypothetical national standard looming around to be superimposed on the states by federal government surveillance.

It has been suggested and held by the First Circuit[2] despite the foregoing that national standards must apply in federal cases. We submit that is impossible.

Elementarily a statute is unconstitutionally vague if it does not furnish an ascertainable standard of guilt. *United States v. L. Cohen Grocery Co.,* 255 U. S. 81, 89; *Lanzetta v. New Jersey,* 306 U. S. 451, 453, 455. This court has said that states should make their own choices of patent offensiveness and prurient interest in accord with their standards because essentially there shouldn't and couldn't be a national standard. This court has said that a national standard was not ascertainable. *A national standard, therefore, is not an ascertainable standard of guilt, period.* 18 USC 1462 is unconstitutional for cases pending on June 21, 1973.

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[2]*United States v. One Reel of Film,* no. 73-1181, 1st Cir., July 16, 1973.

B. Until Congress makes the federal statute turn on state law, it is unconstitutional; in any event 18 USC 1462 is both vague and overbroad until there is a reasonable time for state law to be formulated.

Congress undoubtedly has the power to enact a penal statute which makes the application of the federal law dependent upon state law, *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, and we will assume Congress can do so in the area of First Amendment rights. See *Manual Enterprises, Inc., v. Day*, 370 U. S. 478, 488. However, it is also assumed "in the absence of a plain indication to the contrary," that Congress is not making the application of a federal penal statute dependent upon state law, or definitions under state law. *Jerome v. United States*, 318 U. S. 101, 104; *United States v. Turley*, 352 U. S. 407, 411. In the absence of such a plain indication of Congressional intent, it is beyond the power of this court under Article 1, Section 1 of the United States Constitution and due process to make the federal penal statutes turn on state law. And until Congress does act, we have federal penal statutes directly affecting the First Amendment where we do not know what it means, cannot know what it means, and where there is no ascertainable standard of guilt.

Let us assume, *arguendo* only, this court does have the power to make substantive elements of the federal crime turn on state law, the federal statute is nonetheless both unduly vague and overbroad as written and applied, especially as to the patently offensive test. For there can be no prosecutions, or convictions, unless and until the state legislative bodies, or possibly the state courts, act to specifically define those patently offensive descriptions or depictions of hard-core sexual conduct which will be regulated or banned. At present it is not possible to tell

what the state law is. No matter what the technique, due process demands there be a reasonable period of time for the states to act.

Under any view 18 USC 1462 is unconstitutional and the conviction should therefore be reversed.

For certiorari purposes we assure this court that the questions raised by this Point IV will be involved in virtually every single federal prosecution.

V.

18 USC 1462 is unconstitutional as unduly vague, for even as to acts after June 21, 1973, the choice of which of the different categories of patently offensive descriptions of sexual conduct may be banned are policy decisions for Congress, not the courts.

In Point IV we urged that federal court application of the patently offensive and prurient interest test must turn on state law and on the same premises 18 USC 1462 was unconstitutional. If the court disagrees, we respectfully submit that it will be nonetheless an unconstitutional exercise of legislative power for this court, under *12 200-Ft. Reels, supra,* 37 L. Ed. 2d at 507, n. 7, to construe 18 USC 1462 by picking and making a policy decision of which of the many diverse categories of patently offensive depictions of sexual conduct are covered or proscribed by the statute.

In *United States v. Thirty-Seven Photographs,* 402 U. S. 363, 369, 374 (cited in note 7), the court concededly construed the statute, but in that case the court was reading a 60 or 74 days time limitation into the statute. The proper equivalent judicial function of construction and interstitial law making would involve an interpretation, to avoid vagueness, of the different categories of patently

offensive depictions of sexual conduct, but only after Congress has exercised its policy making decision to determine which, if any, should be proscribed.

Under part (b) of the new tripartite test there are some ten to eleven completely disparate and different categories of depictions of sexual conduct which Congress (and any state) may elect to proscribe. They include inter alia a patently offensive representation (i. e., picture) of an ultimate sex act, a patently offensive description (i. e., written word) of a simulated ultimate sex act and lewd exhibition of the genitals. Each of these categories will undoubtedly require authoritative construction to avoid vagueness. Interpreting these categories, after Congress has chosen which it will ban, is a judicial function. But it is first a policy decision for Congress to make as to whether any one or which ones of these categories may be proscribed. Otherwise this court is impermissibly legislating. *62 Cases, More or Less v. United States*, 340 U. S. 593, 596, 600 (1951); *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 617 (1944); *Christner v. Poudre Valley Cooperative Association*, 235 F. 2d 946, 950, n. 2 (10th Cir. 1956) (collation of Supreme Court cases).

While *Miller, supra*, and *Paris Adult Theatre, supra*, involved state cases, this court in both those cases emphasized that decisions concerning banning of sexually-oriented material was primarily a legislative function. In addition, we submit the reformulation in *Miller, et al., supra*, is quite different from the reinterpretation under *Roth v. United States*, 354 U. S. 476 (1957), and *Memoirs v. Massachusetts*, 383 U. S. 413 (1966), for several reasons. We note one. This court now holds that certain categories of material may under the First Amendment be banned by Congress, which even under the most conservative view of the law all must agree heretofore could not be banned by Congress under this court's de-

cisions pre-*Miller*. The holding that the First Amendment is not a bar to regulation of such material is properly a judicial function. However, the decision as to whether to reimpose the controls is a legislative function. What we urge here is especially applicable if, as stated in Point IV, the federal law must turn on state law definitions.

The amendment and revision of the statute is for Congress, not the courts. U. S. Constitution, Article I, Section 1.

In closing, we do not think we are overstating the matter by reemphasizing that the *Miller, supra, et al.*, questions raised by this petition affect entire industries and hundreds of cases. These issues will be the subject of innumerable petitions and direct appeal applications to this court. These issues ought to be, indeed, must be resolved if the basic objectives of *Miller* are to be achieved.

CONCLUSION.

For the foregoing reasons petitioner prays that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT,

Chicago, Illinois 60604.

December 14, 1972.

Before:

Hon. Walter J. Cummings, Circuit Judge.
Hon. John F. Kilkenny, Sr. Circuit Judge.*
Hon. Robert A. Sprecher, Circuit Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ALAN DAVID SIANS,

Defendant-Appellant.

No. 71-1346

Appeal from the United States District Court for the Northern District of Illinois, Western Division (70 CR 15)

IT IS ORDERED by the Court that a decision of this appeal be held in abeyance until the Supreme Court decided the case entitled *United States v. Orito,* No. 70-69 (October Term, 1972).

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*Judge John F. Kilkenny of the Ninth Circuit sitting by designation.

APPENDIX B.

UNITED STATES COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT,

Chicago, Illinois 60604.

Argued October 24, 1972.

July 5, 1973.

Before:

Hon. Walter J. Cummings, Circuit Judge.
Hon. John F. Kilkenny, Senior Circuit Judge*
Hon. Robert A. Sprecher, Circuit Judge.

UNITED STATES OF AMERICA,

Appellee,

vs.

ALAN DAVID SIANS,

Appellant.

No. 71-1346

Appeal from the United States District Court, Northern District of Illinois, Western Division, No. 70 CR 15 WD Julius J. Hoffman, Judge.

*The Honorable John F. Kilkenny, Senior Circuit Judge for the Ninth Circuit, sitting by designation.

ORDER

Appellant was charged with, tried by a jury and convicted of, knowingly and willfully employing a common carrier for the interstate transportation of obscene materials in violation of 18 U.S.C. §1462. *United States v. Orito,* U. S. (June 21, 1973) answers appellant's challenge to the constitutionality of the statute. The material, by any standard, is shockingly obscene. We find nothing in the other contentions to justify comment. Accordingly, the judgment of the lower court must be affrmed.

IT IS SO ORDERED.

APPENDIX C.

UNITED STATES COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT,

Chicago, Illinois 60604.

August 2, 1973.

Before:

Hon. Walter J. Cummings, Circuit Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ALAN DAVID SIANS,

Defendant-Appellant.

No. 71-1346

Appeal from the United States District Court for the Northern District of Illinois, Western Division. (70 CR 15)

On consideration of the motion of counsel for defendant-appellant,

IT IS ORDERED that leave be granted to file instanter the amendment to petition for rehearing presently lodged in the Office of the Clerk of this Court.

APPENDIX D.

UNITED STATES COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT,

Chicago, Illinois 60604.

August 8, 1973.

Before:

Hon. Walter J. Cummings, Circuit Judge.
Hon. Robert A. Sprecher, Circuit Judge.
Hon. John F. Kilkenny, Sr. Circuit Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ALAN DAVID SIANS,

Defendant-Appellant.

No. 71-1346

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (70 CR 15)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

APPENDIX E.

UNITED STATES CONSTITUTION:

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Due Process Clause of the Fifth Amendment

No person shall be * * * deprived of life, liberty, or property, without due process of law.

Article I, Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 8, Clause 18

The Congress shall have Power To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

UNITED STATES CODE:

Title 18, Section 1462

§ 1462. Importation or transportation of obscene matters.

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.